MOTION FILED
JAN 28 2000

No. 99-1081

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER - TOWN OF MULDROW

Phillip R. Dixon*
Dixon, Doub & Conner
110 E. Arlington Blvd.
Greenville, NC 27858
(252)355-8100

*Counsel of Record
Attorneys for Amicus Curiae

Additional Counsel
William J. Little, III
William J. Little, III, P.A.
304B Greenville Blvd.
Greenville, NC 27858
(252)353-5803

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING. ii

QUESTION PRESENTED. ii

TABLE OF AUTHORITIES. iii

INTEREST OF AMICUS CURIAE. 1

Motion for Leave to file Amicus Curiae Brief. 1
Objections and consent by the Parties. 2

SUMMARY OF ARGUMENT. 2

ARGUMENT. 3

POINT I. 3
The federal statutes - 7 U.S.C.§ 1926(b), Omnibus Reconciliation Act of 1986 (Pub. L. No. 99-509) and Agricultural Credit Act of 1987 (Pub. L. No. 100-233) are unambiguous on their face.

POINT II. 5
The federal statutes do not permit the taking of property by the water association.

CONCLUSION. 7

CERTIFICATE OF SERVICE. 8

APPENDIX. 9

PARTIES TO THE PROCEEDINGS

PETITIONERS

Town of Muldrow and the Muldrow Public Works Authority. The Muldrow Public Works Authority is a public trust, of which the Town of Muldrow is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "Town of Muldrow", and "Muldrow" are intended to encompass both Petitioners.

RESPONDENT

Sequoyah County Rural Water District No. 7. Referred to herein as "Sequoyah."

QUESTION PRESENTED

Whether the interpretation of 7 U.S.C. § 1926(b) by the Tenth Circuit Court of Appeals violates the rules of statutory interpretation.

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986). 5

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d (1989). 3

Bell Arthur Water Corporation v. Greenville Utilities Commission, 975 F. Supp. 951, 959, aff'd. 173 F.3d 517 (4th Cir., 1999). 3, 5

City of Madison, Mississippi v. Bear Creek Water Association, 816 F.2d 1057 (5th Cir., 1987). 5

CSL Utilities, Inc. v. Jennings Water, Inc., 16 F.3d 130 (7th Cir., 1994). 4

Hennepin County Medical Center v. Shalala, 81 F.3d 743, 748 (8th Cir., 1996). 7

Jennings Water Inc v. City of North Vernon, Indiana, 895 F.2d 311, 315 (10th Cir., 1988). 3, 4

Scioto County Regional Water District No. 1 v. Scioto Water, Inc., 103 F.3d 38 (10th Cir., 1996). 4

Sequoyah County Rural Water District No. 7 v. Town of Muldrow, (10th Cir., 1999). 4

Glenpool Utilities Services Authority v. Creek County Rural Water District No.2, 861 F.2d 1211, 1214 (10th Cir., 1988). 3

North Shelby Water Company v. Shelbyville Municipal
Water & Sewer Commission,
803 F. Supp. 15, 22 (E.D.Ky, 1992). 5

Rural Water System #1 v. City of Sioux Center,
Iowa, 967 F. Supp. 1483, 1516
(N.D. Iowa, 1997). 3, 4

Statutes

7 U.S.C. §1926(b). 2

Public Laws

99-509 (Omnibus Reconciliation Act of 1986). 4

100-233 (Agricultural Credit Act of 1987). 4

State Statutes

North Carolina General Statutes 62-3(23)(d). 1

North Carolina General Statutes 62-110.5 1

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the signatory respectfully makes this motion for leave to file an *amicus curiae* brief in support of Petitioner.

The movant and as *amicus curiae* for Petitioner, is a governmental agency chartered by the General Assembly of the State of North Carolina to provide utility services within and outside of the corporate limits of the City of Greenville, North Carolina.

States, like North Carolina, do not require or exempt rural water associations from regulation by the State Public Service Commission. N.C.G.S. §62-3(23)(d). As part of this exemption or exclusion, rural water associations may but are not required to obtain Certificates of Public Convenience and Necessity or to establish themselves as a water district. See N.C.G.S. §62-110.5.

Where rural water associations are not regulated, either by choice or statutory exception, the use of the federal loan program for construction of water facilities to provide potable water to rural customers has been used not as a shield against expansion by municipalities but as a sword to promote expansion without a corresponding demonstration of ability to serve.

The decision in the court below squarely holds statutory interpretation, which is not in conflict with the plain meaning of the statute and the legislative intent, can be ignored to the detriment of municipalities or other governmental agencies. This Court's decision will potentially affect all similar statutes and municipalities. The amicus thus has a strong interest in the outcome of the case.

OBJECTIONS AND CONSENT

The Petitioner, Town of Muldrow, does not object and gives its consent to the filing of this motion and the brief of *amicus curiae*. (Appendix I). The Respondent, Sequoyah, does not consent and objects to this motion.

SUMMARY OF ARGUMENT

This Court and the federal circuits, when called upon to address an issue of statutory interpretation, have declared the plain meaning of the statute governs where the language is unambiguous.

With the exception of the Tenth Circuit Court of Appeals in the present case, the federal courts that have been called upon to provide an interpretation of 7 U.S.C. § 1926(b) concerning federal loans to rural water associations and the buy out provisions authorized by Congress in 1986 and 1987, have declared these statutes to be unambiguous and the intent of the legislators clear from the plain meaning of these statutes.

The court below acknowledged and agreed with the basic rules of statutory interpretation, but went further than the intent of the legislators in applying the word "curtailment" to the phrase "during the terms of the loan." The court erred in its interpretation by concluding a water association could seek damages or other relief by an alleged encroaching utility after the loan had been paid and satisfied and the debt discharged. Such an interpretation affords greater protection than is declared as the purpose of the statute and is an improper taking of affected the governmental agency's property.

For these reasons, the signatory prays this Court to grant this motion for leave to file an *amicus curiae* brief in support of Petitioner's request to reverse the decision of the court below.

ARGUMENT
POINT I

THE FEDERAL STATUTES - 7 U.S.C. § 1926(B), OMNIBUS RECONCILIATION ACT OF 1986 (PUB.L. NO. 99-509) AND AGRICULTURAL CREDIT ACT OF 1987 (PUB. L. NO. 100-233) - ARE UNAMBIGUOUS ON THEIR FACE.

The court erred in its interpretation of the protections afforded under 7 U.S.C. § 1926(b) as to the continuing indebtedness prong of the test. The two prongs of the test, as set forth in Glenpool Utility Services Authority v. Greek County Rural Water District No. 2, 861 F.2d 1211, 1214 (10th Cir., 1988), are (1) have a continuing FmHA indebtedness and (2) have provided or made service available to the disputed area; Accord Bell Arthur Water Corporation v. Greenville Utilities Commission, 972 F.Supp. 951, 959, aff'd. 173 F3d 517 (4th Cir., 1999). As was noted by the court, § 1926(b) must be given a broad or liberal interpretation. Bell Arthur Water Corporation v. Greenville Utilities Commission, Id. citing. Jennings Water, Inc. v. City of North Vernon, Indiana, 895 F.2d 311, 315 (10th Cir., 1998).

In interpreting or construing a statute, the first task for any court is the language of the statute itself. Rural Water System #1 v. City of Sioux Center, Iowa, 967 F. Supp. 1483,1516 (N.D. Iowa, 1997) citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed. 2d 290 (1989). When the language of the statute is plain and unambiguous, no further inquiry is necessary and the court's duty is to enforce the statute according to its terms, except when a literal reading of the statute creates a result contrary to the legislator's intent. Rural Water System #1, 967 F. Supp. at 1517. However the meaning of the statute whether plain or not is dependant upon context. Rural Water System #1, 967 F. Supp. at 1518-1519.

The focus of the liberal interpretation of § 1926(b) by the 10th Circuit involved the interpretation of continued protection as a result of the rural water association's participation in Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, and the Agricultural Credit Act of 1987, Pub. L. 100-233, particularly subsections (f) and (g).

The court improperly dismissed the interpretation of these subsections of the buy out programs as set forth in Scioto County Regional Water District No. 1 v. Scioto Water, Inc., 103 F.3d 38 (6th Cir., 1996) but also the extensive analysis of these two statutes by the district court in Rural Water System No. 1 v. Sioux Center, Iowa, 916 F. Supp. at 1516-1523. Since CSL Utilities, Inc. v. Jennings Water, Inc., 16 F.3d 130 (7th Cir., 1994), the courts have consistently held § 1926(b) protection is available only for the life or time of the loan.

In the present case, Sequoyah County Rural Water District No. 7, participated in the statutory buy out provisions and its debt to the United States was extinguished. Sequoyah County Rural Water District No. 7 v. Town of Muldrow, 191 F.3d 1192, 1200 (10th Cir., 1999). However, the court concluded "even if a water association has repurchased its loan and discharged its debt to the government, encroachments which occurred during the terms of the loan are protected." *Id.* at 1200. In making this determination, the court took the phrase "during the term of such loan" out of context and used it to apply its own interpretation to the word "curtailment." By doing so, not only did the court ignore the rules concerning statutory construction, but ignored one of the most purposes of § 1926(b). "The primary beneficiaries of § 1926(b)'s ban on association service curtailment are not the associations themselves, but rather the FmHA and the individual rural consumers who would not have inexpensive and reliable water service without FmHA supported rural water associations." (emphasis added) Jennings Water, Inc. v. City of North Vernon, Indiana, 895 F2d 311, 317 (7th Cir., 1989).

The interpretation of the Tenth Circuit is without foundation or support. As noted in North Shelby Water Company v. Shelbyville Municipal Water and Sewer Commission, 803 F. Supp. 15, 22 (E.D.Ky., 1992), curtailment is that which would reduce its per unit costs and make the loan more secure. There was no evidence presented nor addressed by the court to demonstrate such curtailment. The court simply concluded such would "create a disincentive" for the rural water association to repay its loan. It is apparent from the undisputed facts there was no such disincentive or curtailment.

POINT II

THE STATUTES DO NOT PERMIT THE TAKING OF PROPERTY BY THE WATER ASSOCIATION.

In one of the first cases to decide 7 U.S.C. § 1926 - City of Madison, Mississippi v. Bear Creek Water Association, 816 F.2d 1057 (5th Cir., 1987), the court held a municipality could not curtail a water association's service area by exercising its right of condemnation through eminent domain proceedings.

The interpretation by the court below of this statute creates the reverse situation. As noted by the Fourth Circuit in Bell Arthur Water Corporation v. Greenville Utilities Commission, 173 F.3d 517, 524-526 (4th Cir., 1999), the area served is defined by where service has been made or made available and the capacity or ability to make such service available in order to repay its federal loan.

Nowhere in the decision of the court below, did it find as a material fact in dispute, even affording the reasonable inferences to the nonmoving party Sequoyah, that the water association's ability to repay its federal loan or provide low per user cost was curtailed. The court below, contrary to the standards set forth in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986), sought to establish materiality

not as a criteria for categorizing factual disputes, but as a means of evaluating the evidentiary foundations of the disputes.

As a result of its interpretation, the Tenth Circuit asserts water associations, whose debts have been discharged, may take the property of a municipality where there are no "rights" capable of protection. Sequoyah no longer had a right to assert the "shield of protection" under 7 U.S.C. § 1926(b) because its debt was discharged; however, the decision below gives it a "sword" to take from a municipality.

CONCLUSION

The Tenth Circuit's decision was not supported by the law governing statutory interpretation. On the contrary, it took unambiguous statutory language out of context, and created an exception or interpretation to the plain meaning of the statute that failed to consider the whole law and its objections and policy. Hennepin County Medical Center v. Shalala, 81 F.3d 743, 748 (8th Cir., 1996). For this reason, the Court should grant certiorari to prevent such abuse of interpretation and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

Phillip R. Dixon, Sr.,
Counsel of Record
Dixon, Doub & Conner
P. O. Drawer 8668
Greenville, NC 27835-8668
(252) 355-8100
N.C. State Bar No. 06120
Admitted before the US Supreme Court

William J. Little, III
Counsel for Amicus Curiae
William J. Little, III, P.A.
P. O. Drawer 78
Greenville, NC 27835-0078
(252) 353-5803
N.C. State Bar No. 7860

CERTIFICATE OF SERVICE

The undersigned certifies that pursuant to Sup. Ct. R. 29, three copies of the foregoing Motion for Leave to File Amicus Curiae Brief was served on the parties in the case before this Court by depositing the same by First Class Mail, postage prepaid with the United States Postal Service and mailed to the counsel for the parties at the following addresses:

James C. Milton, Esquire
Doerner, Sanders, Daniel & Anderson, L.L.P.
Suite 500
320 South Boston Avenue
Tulsa, OK 74103-3725
(Counsel for Petitioners)

Steven M. Harris, Esquire
Doyle & Harris
2431 East 61st Street, Suite 260
Tulsa, OK 74136
(Counsel for Respondent)

This the 27th day of January, 2000.

Phillip R. Dixon, Sr., Esq.
Counsel for Amicus Curiae

No. 99-1081
IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CONSENT TO FILING OF BRIEF BY AMICUS CURIAE

Pursuant to Rule 37, Rules of the Supreme Court of the United States, the Petitioners hereby consent to the filing by the Greenville Utilities Commission of a brief as *amicus curiae*.

James C. Milton
Attorney for Petitioners
Doerner, Sanders, Daniel
& Anderson, L.L.P.
Suite 500
320 South Boston Avenue
Tulsa, OK 74103-3725
(918)582-1211